

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Federal-State Joint Board on  
Universal Service

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CC Docket No. 96-45

INTRODUCTION AND SUMMARY

The New York State Department of Public Service ("NYDPS") hereby responds to the Federal Communication Commission's ("Commission") Further Notice of Proposed Rulemaking ("FNPRM") released on January 12, 2001. The Commission seeks comments on the recommended decision of the Federal-State Joint Board on Universal Service ("Joint Board") on the proposal of the Rural Task Force's ("RTF") recommendations for revision of the federal "high cost" support mechanism for rural study areas.<sup>1</sup>

The RTF, appointed by the Joint Board on July 1, 1998, was charged with considering whether a forward-looking economic cost ("FLEC") mechanism for rural carriers "should have platform design features or input values that are different from

<sup>1</sup> The rural study areas under consideration in this case are actually the study areas of incumbent local exchange carriers that fall under the statutory definition of "rural carriers." As this definition is based largely on the size of the carrier, rather than the characteristics of its service territory, some of the study areas at issue here may encompass significant amounts of non-rural territory (e.g., towns, suburbs, even cities). In addition, the areas under consideration do not include the significant amounts of rural territory served by "non-rural" carriers.

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those that are appropriate for non-rural carriers.”<sup>2</sup> The RTF submitted its recommendation to the Joint Board on September 29, 2000. Its principal recommendations are to eschew the use of any FLEC model for calculating “high cost” support in rural company study areas, and to inflate the existing embedded cost-based support mechanism for these areas. The Joint Board sought comment on the RTF’s recommendations in a Public Notice released on October 4, 2000. In response to the Joint Board’s Public Notice, the NYDPS filed comments opposing the RTF’s recommendations, and, we do so again herein.

**I. The Recommended Mechanism May Provide Excessive Federal Support In The Affected Study Areas**

The Commission seeks comments on whether the RTF’s plan “provide(s) for universal service support that is sufficient for purposes of the Telecommunications Act of 1996.”<sup>3</sup> The RTF recommends that federal high cost support in rural company study areas be determined by expanding the existing rural company high cost mechanism to remove the effects of caps placed on it in prior years.<sup>4</sup> The RTF recommends that this amount should then be allowed to grow annually in proportion to both line growth and inflation. In addition to these newly capped amounts, the RTF further proposes that rural ILECs be allowed to recover:

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<sup>2</sup> CC Docket 96-45, Public Notice (FCC 98J-1) released July 1, 1998 at p.3.

<sup>3</sup> CC Docket 96-45, Further Notice of Proposed Rulemaking (“FNPRM”)(rel. January 12, 2001) at ¶ 4.

<sup>4</sup> The existing mechanism for rural study areas bases support on the incumbent company’s embedded (booked) costs. The overall fund size is allowed to grow only to the extent that additional lines are placed in service each year. In addition, the amount of corporate operations expenses included in calculating a study area’s support is limited. The RTF proposes “rebasings” rural study area support as though these caps were not in effect.

- 1) the costs of catastrophic events (e.g., floods, fires, other natural disasters);
- 2) a portion of additional costs incurred when the company's plant in service grows more than 14% annually (a so-called "safety net"); and,
- 3) some undefined amount of additional funding for investments made after acquiring exchanges from other carriers (a so-called "safety valve mechanism.")

According to the Joint Board, the RTF estimates that this "rebasing" would increase the fund by \$118.5 million in the first year.<sup>5</sup> Based on an *ex parte* filing made by the RTF on November 10, 2000, however, it appears that this "rebasing" would enlarge the current support available to these study areas (\$1.553 Billion) by approximately \$132 million in the first year, and by over \$177 million per year on average over the five year life of the proposal.<sup>6</sup> This filing also indicated that the proposed "safety valve" and "safety net" would add approximately another \$46 million per year on average over five years.

The Telecommunications Act of 1996 states that federal universal service "support should be explicit and sufficient to achieve the purposes of this section."<sup>7</sup> As the Commission observed in its order adopting a forward-looking support mechanism for non-rural company study areas, "the primary role of federal high-cost support is to enable reasonable comparability of rates *among* states."<sup>8</sup> The Commission has also stated its commitment "to the objective that the fund not be any larger than is necessary to achieve

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<sup>5</sup> Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service ("RTFs' Recommended Decision"), FCC 00J-4 at FN25.

<sup>6</sup> Letter from William R. Gillis, Rural Task Force, to the Hon. Magalie Roman Salas, FCC, dated November 10, 2000.

<sup>7</sup> Telecommunications Act of 1996 §254(e).

<sup>8</sup> CC Docket 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration ("Ninth Report and Order"), Adopted: October 21, 1999, Released: November 2, 1999 at ¶ 7 (emphasis added).

the various goals of section 254.”<sup>9</sup> Thus, the federal universal service support mechanism should provide each area only the amount of support needed to enable the relevant state to ensure reasonably comparable rates in that area. To determine whether any proposed mechanism would achieve these goals, the proponents must provide an analysis of the need for support and show that the proposed mechanism will provide that amount, and only that amount, of support.

The RTF has provided no such analysis in support of its recommended mechanism, nor has the Joint Board conducted its own independent examination of need and proposed support in each rural company study area. The Joint Board does not offer any empirical evidence that the proposed high cost mechanism will produce only “sufficient” support in rural company study areas. No attempt has been made to show that either the total amount of support recommended or the amount of support that would be available in individual study areas is, in fact, not excessive.<sup>10</sup>

The general analysis proffered by the RTF provides no justification for the specific level of “rural” funding proposed or for its distribution among rural company study areas. The RTF has not shown that \$1.7 billion is both necessary and sufficient support for these areas. Indeed, when it made its recommendation, it didn’t even indicate how much support the proposed mechanism would make available in any rural company study area. Absent such a basic showing of how the proposed mechanism would satisfy the specific levels of need in rural company study areas, neither we nor the Commission can determine whether the RTF’s proposed funding would be “sufficient.” Thus, the

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<sup>9</sup> Ninth Report and Order at ¶ 59.

<sup>10</sup> Telecommunications Act of 1996 §254(b)(3).

Commission should not approve the plan at this time because the RTF and the Joint Board have failed to provide a reasonable explanation for increased funding. 5 U.S.C. §706(2)(A); Texas Office of Public Utility Counsel, et al. V. FCC, 183 F.3d 393 (5<sup>th</sup> Cir. 1999); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

**II. The RTF's Recommendations For Enabling Or Encouraging Investments In "Advanced Service" Capabilities Are Premature**

As an initial predicate for its recommended support mechanism, the RTF "reached agreement that a primary purpose of universal service support is to promote investment by both ILECs and CLECs in rural America's telecommunications infrastructure" in order "to ensure universal access to telecommunications services which are comparable to those available in urban areas, and to provide a platform for delivery of advanced services."<sup>11</sup> The Task Force further declares that "provision of access to advanced services is required under Section 254(b)" and asserts that its proposed mechanism "inherently provides incentives for the infrastructure investments necessary for providing access to advanced services."<sup>12</sup> The RTF recommends adoption of a "no barriers to advanced services" policy that would require universal service funding to support plant investments that provide, or could be augmented to provide, access to advanced services.

In addition, the RTF found that the Act separately requires reasonably comparable access to information services (e.g., access to Internet Service Providers).<sup>13</sup> It concluded that this mandate requires rural networks to be capable of providing the

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<sup>11</sup> RTF's Recommended decision at p.14 (emphasis added).

<sup>12</sup> RTF's Recommended decision at p. 22.

<sup>13</sup> RTF's Recommended decision at p. 23.

same “bit rate” as do urban networks, which the RTF contends is 28.8 kilobits per second (kbps). Thus, the RTF recommends that the definition of services to be supported by federal universal service funds be expanded to include access to information services at speeds reasonably comparable to those available to urban customers.

In finding that the RTF proposal provides a “good foundation” for rural carrier high cost support, the Joint Board seems to have implicitly endorsed the proposition that the purpose of this fund should be to provide incentives for investment in new infrastructure and technologies.<sup>14</sup> We have found no other purported justification in the Joint Board’s Recommended Decision for increasing the current levels of rural study area high cost funding. Certainly, the Joint Board made no finding as to the need for, or ability of, the RTF proposal to enable reasonably comparable rates, the basis for its prior endorsement of the non-rural high cost mechanism.

While we do not seek to consign rural customers to being served by second-rate telephone networks, the RTF’s recommendations should be rejected. The RTF has simply “put the cart before the horse” in recommending federal funding for access to information and advanced services at this time. As the RTF itself recognizes, the Joint Board and Commission must first add access to information or advanced services to the list of supported services before they are eligible for support through the Federal universal service fund. The RTF’s recommendation reverses that process.<sup>15</sup>

Furthermore, the RTF’s reliance on §254(b) to support its view that access to information and advanced services are required, has already been rejected. The Fifth

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<sup>14</sup> FNPRM ¶ 12, 17, 20.

<sup>15</sup> Telecommunications Act of 1996 §254(b).

Circuit has determined that the principles enumerated in §254(b) are not “specific statutory commands” that require “the FCC to adopt certain cost methodologies for calculating universal service support.”<sup>16</sup> Moreover, §254(c)(1)(B) requires the Joint Board and the Commission in evaluating services for inclusion in the definition of “services that are supported by Federal universal service support mechanisms” to consider whether such services “have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers.” The RTF has made no such showing. Finally, §254(e) commands that federal universal service funds be used “only for the provision, maintenance, and upgrading of facilities and services for which it is intended” (i.e., the services that are defined as eligible for support under § 254(c)). Thus, funding to support services not currently on the list of eligible services would violate §254.

### **III. “Rebasing” The “High Cost Fund” Would Be An Inefficient Mechanism For Providing Investment Incentives**

Even if providing incentives for investment in advanced services capabilities were an appropriate goal of federal universal service fund, simply increasing the rural high cost fund would be an inefficient mechanism for doing so. As an initial matter, the bulk of the additional funding proposed by the RTF comes from “rebasing” the existing fund and those funding increases will begin to flow to carriers immediately based on past behaviors. As such, this additional funding cannot possibly provide an incentive for future investment.

Even looking forward, there simply is no necessary nexus between the purported desired outcome (investment in new infrastructure) and the supposed incentive

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<sup>16</sup> *Texas Office of Public Utility Counsel v. FCC*, 183F.3d 393 (5<sup>th</sup> Cir.1999). Cert. Granted.

(additional high cost funding). The proposed rural high cost mechanism does not require a carrier to invest in new plants in order to receive additional funding. Indeed, carriers may receive additional funding for any number of other cost increases (*e.g.*, higher salaries, greater corporate operations expenses, increased maintenance). On the other hand, making incremental investments in new infrastructure does not guarantee additional support if the carrier's overall costs are relatively low or if other carriers' costs increase even more. Due to this lack of nexus, it is entirely possible that all of the proposed additional funding will produce exactly zero additional investment in new infrastructure.

Compounding these shortcomings is the fact that no attempt has been made to identify study areas in need of support for infrastructure investment and to target support to those areas. In fact, there has been no showing that any specific study area actually lacks adequate infrastructure or the ability to deploy it. Furthermore, neither the RTF nor the Joint Board has specified what particular investments this funding should be "incenting." If the Commission intends to pursue a policy of publicly financing advanced services deployment (and we don't believe it should), it must develop a mechanism that more efficiently targets public support to areas in need. RTF's proposal falls short of this goal.

### CONCLUSION

The RTF has done an admirable job of representing its constituency - small companies in rural American. By its own admission, however, its recommendations are merely the consensus of the thirteen individuals who signed the final report. Further, the



signors admittedly do not represent the positions of their respective organizations.<sup>17</sup> The Joint Board's reliance on this consensus is therefore misplaced, not only because it is so limited, but more so because even a consensus solution must comport with the law.

The Commission must balance the interests of those who will benefit from these high cost funds with the interests of those who must pay for these programs. Absent a showing that those payors are being asked to fund only the amount sufficient to meet the Act's universal service requirements, the RTF's proposal should be rejected.

Respectfully submitted,



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<sup>17</sup> RTF's Recommended decision at p.3.